No. 285

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, PETITIONER,

v.

ISTHMIAN STEAMSHIP COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
RALPH S. SPRITZER,
Assistant to the Solicitor General,
SAMUEL D. SLADE,
LEAVENWORTH COLBY,
SEYMOUR FARBER,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

489540—58——1

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 285

UNITED STATES OF AMERICA, PETITIONER

v.

ISTHMIAN STEAMSHIP COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 16–19) is reported at 134 F. Supp. 854. The opinion of the Court of Appeals (R. 23–24) is reported at 255 F. 2d 816. The opinion of the Court of Appeals in the related case of *Grace Line, Inc.* v. *United States*[1] (Appendix, *infra*, pp. 34–44), is reported at 255 F. 2d 810.

[1] The opinion in the instant case incorporates by reference the reasons expressed by the court in *Grace Line, Inc.* v. *United States*. Review of the decision in the *Grace Line* case was not sought because that decision rests on an additional ground which, at the present time, does not appear to be of general importance. See fn. 3, p. 6, of the petition for certiorari in this case.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1958 (R. 25). The time within which to file a petition for a writ of certiorari was extended to and including August 19, 1958, by order of Mr. Justice Harlan, dated July 30, 1958 (R. 26). The petition for a writ of certiorari was filed on August 19, 1958, and granted on October 13, 1958 (R. 26). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Government's long-standing power under 31 U. S. C. 71 to effectuate administrative recoupment, *i. e.*, to withhold funds which it admittedly owes a claimant and to apply them toward the satisfaction of an independent debt which the latter owes to the United States, is inoperative in the field of admiralty.

2. Whether a court, awarding interest in a case arising under the Suits in Admiralty Act, may make an award exceeding the 4 per centum statutory limit by allowing interest on the interest which accrued between the filing of the suit and the entry of the final decree.

STATUTES AND ADMIRALTY RULES INVOLVED

1. Section 305 of the Budget and Accounting Act of 1921, 42 Stat. 24, 31 U. S. C. 71, provides:

> All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as

debtor or creditor, shall be settled and adjusted in the General Accounting Office.

2. Section 3 of the Suits in Admiralty Act, 41 Stat. 526, 46 U. S. C. 743, provides in pertinent part:

> * * * A decree against the United States * * * may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. * * *

3. Section 5 of the Suits in Admiralty Act, 41 Stat. 526, as amended, 46 U. S. C. 745, provides in pertinent part:

> * * * [N]o interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized by section 2 of this Act unless upon a contract expressly stipulating for the payment of interest.

4. The General Admiralty Rules provide in pertinent part as follows:

> Rule 44.
>
> In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules.
>
> Rule 50.
>
> Whenever a cross-libel is filed upon any counterclaim arising out of the same contract or cause of action for which the original libel was

filed, and the respondent or claimant in the original suit shall have given security to respond in damages, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages to the claims set forth in said cross-libel, unless the court for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given unless the court otherwise directs.

5. The Admiralty Rules of the United States District Courts for the Southern and Eastern Districts of New York provide in pertinent part as follows:

Rule 16.

If a respondent or claimant shall desire to recoup or set off any damages sustained by him growing out of the transactions referred to in the libel, he must in his answer state the facts and his own damages in like manner as upon filing a cross-libel, and such statement shall be without prejudice to any other defense which he may interpose. He shall not, however, be entitled to any affirmative recovery upon such answer. In any case where a cross-libel *in personam* will lie, service of such cross-libel may be made on the proctors for the libellant.

Rule 17.

A respondent or claimant may, by petition or pleading, state a claim, arising out of the transaction, occurrence or property that is the subject matter of the original cause, against a co-party who has appeared or claimed in the suit. The petition or pleading may be served upon the proctor for the party against whom the claim is asserted, and in such case the party so

pleaded against shall except to or answer the petition or other pleading within three weeks after such service upon its proctor.

STATEMENT

1. The facts

In 1946, the United States, acting through the War Shipping Administration,[2] chartered out eight vessels to the respondent, Isthmian Steamship Company (Isthmian) on a bare boat basis (R. 6). The charter agreement contained a clause which provided that, if Isthmian's net voyage profits should exceed ten per centum per annum of the capital invested by the charterer during the term of the agreement, Isthmian would pay the United States a part of such excess as additional charter hire (R. 6–7). The United States determined that the additional charter hire due it under this clause, for the period from May 1, 1946 to July 31, 1948, amounted to $115,203.76 (R. 7).

In 1953, Isthmian's vessel *S. S. Steelworker*—not one of the vessels involved in the 1946–1948 bare boat charters—carried certain military cargo for the United States. When Isthmian submitted a freight bill for $116,511.44 (R. 4), the United States, on June 3, 1953, acting pursuant to 31 U. S. C. 71 (*supra*,

[2] Section 202 of the Act of July 8, 1946, 60 Stat. 501, terminated the War Shipping Administration as of September 1, 1946, and transferred its functions to the United States Maritime Commission for the period from September 1, 1946 to December 31, 1946, for the purpose of liquidating the Administration. Upon the abolition of the United States Maritime Commission (1950 Reorg. Plan No. 21, 15 F. R. 3178, 64 Stat. 1273), the remaining functions were transferred to the Department of Commerce, Maritime Administration.

pp. 2–3), withheld the sum of $115,203.76 from that bill, and applied it to the payment of Isthmian's indebtedness to the United States for additional charter hire (R. 8).

2. The litigation

a. In the Court of Claims

Isthmian first sued in the Court of Claims to recover the amount withheld. Its complaint alleged that it had carried cargo on the *S. S. Steelworker* for the Military Sea Transportation Service; that it had submitted a freight bill for its services in the amount of $116,511.44; that the United States did not deny that this sum was owing for transportation of the cargo; that, nevertheless, the Military Sea Transportation Service had drawn a check in the sum of $115,203.76 to the Maritime Administration to cover an alleged claim for additional charter hire, the validity of which Isthmian denied. The United States moved to dismiss on the ground that the subject matter of the controversy was either Isthmian's claim for maritime freight or the Government's claim for additional charter hire, and that, in either event, the district courts had exclusive jurisdiction under the Suits in Admiralty Act. The Court of Claims agreed and granted the motion. *Isthmian Steamship Co. v. United States*, 131 C. Cls. 472.

b. In the District Court

Shortly before the dismissal of its complaint in the Court of Claims, Isthmian filed a libel in the United States District Court for the Southern District of New York alleging that the United States owed Isthmian freight charges for certain cargo transported

on the *S. S. Steelworker;* that Isthmian had presented a bill for $116,511.44; and that the United States had failed and refused to pay $115,203.76 due and payable under the bill of lading (R. 3–4). Unlike its pleading in the Court of Claims, Isthmian's libel made no reference to the fact that the Government had withheld the $115,203.76 in order to satisfy its claim in that amount for additional charter hire.

The answer of the United States (R. 5–8) admitted that Isthmian had submitted a claim for maritime freight for $116,511.44; denied that the Government had failed and refused to pay $115,203.76; and alleged that this sum had been paid by applying it to Isthmian's indebtedness to the United States for additional charter hire in the same amount. Shortly before answer, the Government had filed in the same court a cross-libel against Isthmian for the recovery of $115,203.76 additional charter hire. The day after the filing of its answer, the United States moved to consolidate Isthmian's libel with the Government's cross-libel on the ground that the question of the validity of the Government's claim for additional charter hire was fully dispositive of both libels (R. 9–12).

Isthmian excepted to the answer on the ground that the defensive matter pleaded therein did not arise "out of the same contract, cause of action or transaction for which the libel was filed" (R. 14). It moved that the excepted matter be stricken from the answer and that Isthmian be given judgment on the pleadings (R. 15).

The District Court held that the defense of withholding and applying did not constitute a plea of pay-

ment, but that it constituted a claim of set-off arising from a discrete transaction. Holding further that admiralty had no jurisdiction over such a set-off, it struck the Government's defense and awarded judgment to Isthmian. The court also denied the motion to consolidate because, after the Government's defense had been stricken, Isthmian's libel and the Government's libel no longer had any common issue (R. 16–19).

The final decree awarded Isthmian the sum of $115,203.76, with interest at 4 per centum per annum from the time of the filing of the complaint to the day of decree, amounting to $2,070.51, and $40 costs, totalling $117,314.27. It awarded further interest on that total, at the rate of 4 per centum, from the date of the decree until paid (R. 21). The interest which accrued during the pendency of the litigation in the District Court ($2,070.51) is drawing interest at the rate of 4 per centum per annum; in other words, it has been compounded.

c. In the Court of Appeals

The Court of Appeals affirmed the decision of the District Court on the authority of its ruling in *Grace Line, Inc.* v. *United States,* 255 F. 2d 810, decided on the same day (Appendix, *infra,* pp. 34–44).

In *Grace Line,* the Court of Appeals held that the Government's defense of withholding and applying did not constitute a plea of payment but one of set-off or counterclaim. Such set-off, in the court's view, was not cognizable in admiralty because it did not arise from the transaction on which the libel was based.

Dealing with the Government's argument that its disputed claim for additional charter hire constituted the actual subject matter of the instant controversy, the court said that no "amount of pleading can alter the fact that in this case there is no affirmative defense raised by the government, but rather an attempt to interpose a set-off which is barred by established admiralty procedure" (Appendix, *infra*, p. 42). It concluded that the proper procedure in this type of litigation is to enter a decree *pro confesso* for the libelant. The Government, the court said, may then pursue a remedy under 31 U. S. C. 227, *i. e.*, the Comptroller General can withhold payment of the amount awarded by the decree and cause a new action to be instituted against libelant (Appendix, *infra*, p. 40).

The Court of Appeals also held that Section 3 of the Suits in Admiralty Act, which provides that interest at the rate of not to exceed 4 per centum per annum may be awarded to "run as ordered by the court", authorized the District Court to exceed the 4 per centum rate by the compounding of interest (Appendix, *infra*, pp. 43–44).

SUMMARY OF ARGUMENT

I

Isthmian's libel alleged non-payment of a freight bill. The Government, conceding the correctness of that freight bill, defended on the ground that it had withheld the amount due thereon and had applied the money in satisfaction of a pre-existing maritime claim which the United States had against

Isthmian. The court below has ruled that this defense is not cognizable in admiralty. Its view is that the defense cannot be regarded as one of payment or satisfaction; that the Government is asserting an unrelated or independent set-off; and that it would be contrary to settled admiralty practice to allow such a set-off to be pleaded. It accordingly concluded that Isthmian is entitled to judgment and that the Government's remedy is to institute a second suit to get back the amount of the judgment entered in this suit.

We urge, as numerous decisions of this Court have held, that the Government has the power to strike a balance between the debts which it owes to a private party and the claims which it has against that party. Administratively, it may "set off one debt against another, when a claimant is both debtor and creditor," *McKnight* v. *United States*, 13 C. Cls. 292, 306, affirmed, 98 U. S. 179. When the Government takes such action, *i. e.*, when the United States withholds the amount of its admitted debt and applies it in satisfaction of its own claim, "the true dispute between the parties" is whether the Government's claim is a valid one, *United States* v. *New York, New Haven and Hartford Railroad Co.*, 355 U. S. 253, 263. That, indeed, is the only dispute.

The decision below renders meaningless, in the single class of cases where the Government is dealing with an ocean carrier, the power to withhold and apply. For although the Government has attempted to apply the amount of its admitted debt in satisfaction of its claim, the decision below holds that Isthmian may collect the amount withheld on a mere showing of what is undisputed, *i. e.*, that Isthmian's

freight bill is correct, and that the Government's recourse is by another suit. This is to ignore the substance of the one existing dispute and to permit the form of Isthmian's pleading to control. The binary fission which results has nothing to recommend it unless it be that it succeeds in making two lawsuits grow where only one could be seen before.

We do not, of course, suggest that the Government's act of withholding and applying in any way limits judicial review of the claim upon which that action is predicated. We say simply this: That when the Government applies money which it admittedly owes Isthmian in satisfaction of its own pre-existing claim against Isthmian, it places upon Isthmian a clear choice—to acknowledge the validity of the Government's claim or to bring suit challenging that claim.

II

Alternatively, we argue that, even if the Government's defense be construed as one asserting an independent set-off, it was still within the jurisdiction of the admiralty court and should have been resolved. Policy considerations which, in other circumstances, might justify a refusal to consider an independent set-off in admiralty (*e. g.*, that such consideration would defeat the adverse party's right of trial by jury) have no applicability to the case at bar. There is no reason why admiralty, the forerunner in flexible practice, should decline jurisdiction over a claim which would be clearly permissible under modern practice in a civil or equity court. And neither the admiralty rules of this Court nor the local admiralty

rules forbid adoption of a procedure which would resolve, in one lawsuit, the single controversy between the parties.

III

To the extent that the decision below approves a departure from the statutory 4 per centum limit on the rate of interest which may be awarded in cases arising under the Suits in Admiralty Act, it disregards the settled rule that statutes authorizing the award of interest against the United States are to be strictly construed and that they are deemed to refer to simple interest only.

ARGUMENT

I

The Government's defense of withholding and applying, based upon its power to effectuate administrative recoupment, is cognizable in admiralty

We argue here that the Court of Appeals erred in failing to recognize, *first,* that the Government's defense of withholding and applying is in the nature of a plea of payment, which is, of course, within the jurisdiction of the admiralty courts, and *second,* that in a libel designed to challenge the exercise by the Government of its power to withhold and apply, the Government's disputed claim—the only real controversy between the parties—should be resolved by the admiralty court.

A. The legal import of the Government's defense was payment, not set-off

Section 305 of the Budget and Accounting Act of 1921, 31 U. S. C. 71, *supra,* pp. 2–3, which stems from the Act of March 3, 1817, 3 Stat. 366, and from R. S.

236,[3] provides that all claims and demands by or against the Government shall be settled and adjusted in the General Accounting Office.[4] For nearly a century it has been established that this power to "settle and adjust" includes the authority, if not the duty, "to set off one debt against another, when a claimant is both debtor and creditor". *McKnight* v. *United States,* 13 C. Cls. 292, 306, affirmed, 98 U. S. 179; see, also, *Taggart* v. *United States,* 17 C. Cls. 322, 327–328; *Schooner Henry and Others* v. *United States,*

---

[3] Cf. *United States* v. *Jones*, 119 U. S. 477, 479–480.

[4] There are a number of other statutory provisions which similarly authorize the accounting officers of the Government to withhold and apply in special circumstances. *E. g.*, the Act of March 3, 1875, 18 Stat. 481, as amended, 31 U. S. C. 227, provides for the withholding of payment of a judgment recovered against the United States on account of an indebtedness of the judgment-creditor to the United States; R. S. 1766, 5 U. S. C. 82, provides for the withholding of the salary or compensation of an accountable officer who is in arrears to the United States; the Act of July 15, 1954, 68 Stat. 482, 5 U. S. C. (Supp. III) 46d, provides for the withholding, within certain limitations, of the current salary of Government employees.

Another specialized enactment is Section 322 of the Transportation Act of 1940, 54 Stat. 955, as amended by P. L. 762, 85th Cong., 2d Sess. See *United States* v. *Western Pacific R. Co.*, 352 U. S. 59; *United States* v. *New York, New Haven and Hartford Railroad Co.*, 355 U. S. 253. Under Section 322, the United States is required to pay for the carriage of mail, persons, or property "upon presentation" of the bill. Overcharges, if any, may then be deducted from "any amount subsequently found to be due such carrier." It should be noted that, since the statute applies to carriers subject to the Interstate Commerce Act, it encompasses claims for inland water and coastal shipments (Section 1 of the Interstate Commerce Act, as amended, 49 U. S. C. 1), which are, like the ocean claim here, within the jurisdiction of the admiralty courts.

35 C. Cls. 393, 395. As this Court has noted, when the Government exercises its power under 31 U. S. C. 71, it "strike[s] a balance between the debts and credits of the government." *United States* v. *Munsey Trust Co.*, 332 U. S. 234, 240. Thus, when the United States withholds payment on a debt owed by it and applies it to a valid claim of its own, the indebtedness of the claimant to the United States is discharged, and, conversely, the substance of his claim against the United States is destroyed. *McKnight* v. *United States*, 98 U. S. 179; *United States* v. *American Surety Co.*, 158 F. 2d 12, 13 (C. A. 5); *Sanders* v. *Commissioner of Internal Revenue*, 225 F. 2d 629, 637 (C. A. 10), certiorari denied, 350 U. S. 967; *American Railway Express Co.* v. *United States*, 62 C. Cls. 615, 636, certiorari denied, 273 U. S. 750; *Morgan* v. *United States*, 131 F. Supp. 783 (S. D. N. Y.).

The defense of withholding and applying, therefore, is in the nature of a plea of payment.[5] Concretely, in this case it explains the Government's denial of the allegation in the libel that the United States had failed and refused to pay the $115,203.76 in dispute (*supra*, p. 7). To be sure, the debt owed by the Government is not discharged by the mere *ipse dixit* of the Comptroller General that the claimant, himself, is indebted to the United States. The courts have full power to review the Comptroller's action and to

[5] On the historic relationship between the pleas of payment and set-off, see Waterman, *A Treatise on the Law of Set-Off, Recoupment, and Counterclaim* (1869), Section 560. The author points out that, in the middle of the last century, set-off was raised in several jurisdictions by plea of payment.

determine whether the Government had a valid claim, for only in that event has the Government's indebtedness been discharged. *United States* v. *Munsey Trust Co.*, 332 U. S. 234, 240. Accordingly, contrary to the view held by the court below (Appendix, *infra*, p. 37), the exercise by the Government of its power to withhold and apply is not intended to "bypass the process of adjudication." The effect, rather, is to put the controversy in focus. For when the Government acts upon its claim of right (*i. e.*, when it applies money which it admittedly owes to "X" in satisfaction of its own pre-existing claim against "X"), it places upon the other party a clear choice: to acknowledge the validity of the Government's claim or to dispute it by bringing suit.

B. The validity of the Government's contested claim, not the libelant's uncontested claim, is the real subject matter of this litigation

When a defendant admits all the basic allegations of a complaint and sets up an affirmative defense, the issue which emanates from the answer is the subject matter of the litigation. A litigant may not curtail his opponent's defense by artfully framing his complaint so as to make *bona fide* defenses going directly to the heart of the controversy assume the appearance of a set-off or counterclaim unrelated to the subject matter of the action. Cf. *Eastern Transportation Co.* v. *Blue Ridge Coal Corp.*, 159 F. 2d 642, 643 (C. A. 2); *United States* v. *West*, 8 App. D. C. 59, 64; *Parmelee* v. *Chicago Eye Shield Co.*, 157 F. 2d 582, 586 (C. A. 8); *Lesnik* v. *Public Industrial Corporation*, 144 F. 2d 968, 975 (C. A. 2); *Cleveland Engi-*

neering Co. v. *Galion D. M. Truck Co.*, 243 Fed. 405, 407 (N. D. Ohio).

The essential nature of this action thus cannot be concealed by the fact that respondent, in the formal allegations of its libel, limited itself to a recital of its claim for maritime freight and omitted all reference to the Government's withholding action (which, significantly, had been detailed in respondent's prior complaint in the Court of Claims). The substance of this case is that respondent was seeking money which the Government was withholding and that the Government was withholding, not because it questioned respondent's claim, but solely because of a contested claim which it had against respondent.

In holding that it was bound by the formal allegations of the complaint, the court below acted contrary to the teaching of this Court in *United States* v. *New York, New Haven and Hartford Railroad Co.*, 355 U. S. 253, 263, *viz.*, that, in actions of this type, the courts are concerned with substance, not form, and that, although the complaint may set forth only the claimant's uncontested claim, the true dispute between the parties—the lawfulness of the claim on which the withholding is based—must be determined.

The facts of that case, strikingly analogous to those presented here, are recited at the outset of this Court's opinion as follows (355 U. S. at 254–255):

> The General Accounting Office audited transportation bills of the respondent, rendered and paid in 1944, and determined that the Government was overcharged in the amount of $1,025.26. When the respondent did not refund

this amount on demand, the Government exercised the right, reserved in § 322 of the Transportation Act of 1940, to deduct the overpayments from a subsequent bill. The Government credited that amount against a bill of the respondent, admittedly owing, of $1,143.03 for 1950 transportation services, and paid the balance of $117.77 by check.

The respondent thereupon brought this action under the Tucker Act in the District Court for Massachusetts. The complaint seeks recovery not of the $1,025.26 deducted, but of the full amount of the 1950 bill of $1,143.03. The Government's answer admits the 1950 bill but pleads its payment by the check of $117.77 and the credit of $1,025.26 in liquidation of the overcharges determined in the 1944 bills. The respondent filed a pleading in response to the government answer admitting "that it did receive the check in the amount of $117.77, all as recited by the defendant, leaving the balance due and to this date unpaid in the amount of $1,025.26."

The question presented in both courts below, and in this Court, is whether in this action the carrier has the burden of proving the correctness of the 1944 bills, or the Government the burden of proving that it was overcharged. The District Court held that the respondent carrier was pleading on a contract against which the Government was attempting to "set off" claims under other contracts, and that "whoever attempts to set off the other contractual claims has the burden of showing there are other claims."

This Court reversed, concluding that the matter was not one of set-off. "The true dispute between the parties," the Court stated (pp. 263–264), "involves the lawfulness of the 1944 bills. * * * [T]he respondent is entitled to recover only if it satisfies its burden of proving that its 1944 charges were computed at lawful and authorized rates."

In its present posture, the instant case presents no issue of burden of proof but simply the question whether the "true dispute between the parties" may be litigated. The *New Haven* case certainly provides an affirmative answer to that question unless this Court should conclude that where ocean carriers are concerned the Government lacks withholding authority (but see pp. 12–15, *supra,* and the discussion of the *Alcoa* case, which follows immediately).

In *Alcoa S. S. Co.* v. *United States,* 338 U. S. 421, the Government had paid freight allegedly due for the transportation of cargo on the S. S. "Gunvor," which was sunk before it completed its voyage. Subsequently, the United States determined that the freight had not been earned by the plaintiff and deducted the sum paid from freight charges admittedly due for transportation performed on two other vessels belonging to the plaintiff, the S. S. "Plow City" and S. S. "Alcoa Trader". Plaintiff thereafter brought an action under the Tucker Act[*] on the conceded claim, alleging that the Government had unlawfully deducted some $3,520.52. The answer, admitting the freight earned by the S. S. "Plow City" and S. S. "Alcoa Trader", set forth in detail the

[*] See p. 20, fn. 8, *infra.*

shipment on the "Gunvor", the erroneous payment of freight for the shipment on that vessel, and the application of part of the freight admittedly due on the S. S. "Plow City" and S. S. "Alcoa Trader" toward the overpayment on the "Gunvor".

In contrast to its approach in the instant case, the Second Circuit did not take the position that the freight concededly earned on the shipment on the "Plow City" and "Alcoa Trader" constituted the true subject matter of the lawsuit, and that the Government's plea of withholding and applying constituted a discrete claim. Judge Learned Hand's opinion[7] declares at the outset (175 F. 2d 661):

> The question in the case is whether the United States overpaid the freight due to the petitioner * * * upon a cargo of lumber shipped upon petitioner's ship, "Gunvor".

The Court of Appeals thus recognized that the propriety of the withholding was the sole issue in the case.[7a] This interpretation of the pleadings was accepted by this Court, which stated (338 U. S. at 422):

> At bar is the single question of contract interpretation whether a carrier's "Goods or Vessel lost or not lost" provision survives the terms of the government standard form bill of lading.

It is true that in *Alcoa* the complaint was based on the Tucker Act and not on the Suits in Admiralty

[7] The other members of the panel were Judge Augustus N. Hand (who dissented on other grounds) and Judge Frank.

[7a] To similar effect, see *Pacific-Atlantic Steamship Co.* v. *United States*, 1956 A. M. C. 245 (W. D. Wash.).

Act.[8] Nevertheless, it is difficult to understand how the Second Circuit, which considered the propriety of the withholding "the question in the case" in proceedings brought under the Tucker Act, could hold, as it did here, that this very issue constituted an "unrelated set-off" over which it had no jurisdiction in a proceeding brought under the Suits in Admiralty Act.

Wabash Ry. Co. v. *United States*, 59 C. Cls. 322, affirmed *sub nom. United States* v. *St. Louis, etc., Ry. Co.*, 270 U. S. 1, is also analogous. In that case, the United States had deducted the amount of certain alleged overpayments from subsequent uncontested freight bills. In answer to a complaint seeking to recover the sum withheld, the United States pleaded the statute of limitations, alleging that the proceedings had been started more than six years after the uncontested freight had been earned. The Court of Claims rejected this defense because (59 C. Cls. at 327):

> * * * the deductions were made within six years prior to the beginning of this suit. Plainly the plaintiff's cause of action did not arise until deductions were made from its subsequent bills. * * * Properly speaking, *its right*

[8] The Government had challenged the Tucker Act jurisdiction in the district court without success. Cf. 80 F. Supp. at 162–163. Since the claim involved less than $10,000 and suit had been filed within the shorter limitations period fixed by the Suits in Admiralty Act, the question whether the action should have been placed on the civil or admiralty calendar did not seem to present a substantial appealable issue. Recent decisions such as *Prudential S. S. Corp.* v. *United States*, 220 F. 2d 655 (C. A. 2); and *Lykes Bros. S. S. Co., Inc.* v. *United States*, 129 C. Cls. 455, certiorari denied, 348 U. S. 971, indicate that the case should have been brought under the Suits in Admiralty Act.

> *of action is upon or because of these deductions,* and this is not barred by the statute of six years, the suit having been duly instituted within that time. [Emphasis added.]

Similarly, where the United States withholds payments of a pension on the basis of Government claims against the pensioner, the courts have had no difficulty in reviewing the propriety of the withholding, *i. e.*, in examining the validity of the Government's claim, despite the fact that they lack jurisdiction over pension claims. 28 U. S. C. 1346 (d), 1501. *Reynolds* v. *United States,* 292 U. S. 443; *Price* v. *United States,* 121 C. Cls. 664, certiorari denied, 344 U. S. 911; cf. *McElhany* v. *United States,* 101 C. Cls. 286, 291–292.

In all of these cases, the lawfulness of the Government's withholding constituted the real subject matter of the litigation; there was no other dispute to be litigated. The same is true here: There is only one dispute between the parties, and that dispute, despite the contrived pleadings of the respondent, should have been resolved by the court below.

II

Assuming *arguendo* that the Government's defense constituted a set-off not arising from the same transaction upon which the libel was based, the court below had jurisdiction to entertain the defense

We have argued above that the Government's defense did not constitute an unrelated set-off but formed the basis of the very controversy for which the libel was filed. We urge here that admiralty has jurisdiction over this defense even if it should be deemed (contrary to our view) an unrelated set-off.

A. The jurisdiction of the admiralty courts over set-offs is not limited to those arising from the same transaction

Admiralty courts from time immemorial have led in the development of a flexible practice adapted to the general conditions of maritime litigation but capable of adjustment to the needs of special circumstances.[9] Indeed, this capacity to develop for itself methods and procedures enabling it to deal with the various circumstances that may confront it constitutes the very essence of admiralty, distinguishing it from common law and equity.[10] This Court has only recently commented that "Admiralty practice, which has served as the origin of much of our modern federal procedure, should not be tied to the mast of legal technicalities it has been the forerunner in eliminating

---

[9] See Woolsey, D. J., in *The Cleona*, 37 F. 2d 599, 600 (S. D. N. Y.):

"In the first place, it must be remembered that, fortunately, admiralty practice is plastic. It is largely judge-made, and consequently not technical—in fact, it is less technical than equity practice. Broadening from precedent to precedent, and based on a wisely administered convenience, admiralty practice has always been prepared to cope with new situations as they have arisen. * * * Whilst the practice thus formed on precedent has from time to time been embodied in rules by the Supreme Court which have caused a wise procedure in one court to be made universal in the admiralty courts of the United States, there has never been any tendency in the rules which the Supreme Court has promulgated to limit the freedom of the District Courts in adopting new rules or principles of admiralty practice on appropriate occasion, provided the practice adopted does not conflict with the Supreme Court rules."

[10] *The Epsilon*, 6 Ben. 378, 8 Fed. Cas. 744, 748, No. 4,506 (E. D. N. Y.); see, also, *Dowling* v. *Isthmian S. S. Corp.*, 184 F. 2d 758, 778 (C. A. 3).

from other federal practices." *British Transport Commission* v. *United States*, 354 U. S. 129, 139.

It is appropriate, we believe, that the Court consider the origin of the doctrine that set-offs in admiralty are limited to those arising from the identical transaction pleaded in the libel. In our view, the rule limiting set-off and counterclaims in admiralty is not of a categorical nature, and none of the considerations underlying the rule has vitality here.

1. The first cases narrowing the scope of set-off and counterclaims in admiralty were grounded upon the desire to protect the wage claims of seamen. See, *e. g.*, *Willard* v. *Dorr*, 3 Mason 161, 171–172, 29 Fed. Cas. 1277, 1280, No. 17680 (C. C. D. Mass.); *The Hudson*, Olc. 396, 12 Fed. Cas. 805, No. 6831 (S. D. N. Y.); *Bains* v. *The James and Catherine*, Baldw. 544, 2 Fed. Cas. 410, No. 756 (C. C. D. Pa.). In *Bains* v. *The James and Catherine, supra* (p. 422), the court pointed to the hardship which would be visited upon a seaman and his family if, upon his return from a long voyage, he found his wages applied toward some debt due the owner of the vessel or—even worse—purchased by the owner from another.[11] Obviously, this policy has no application in the present case. Moreover, since 1872 the protection of seamen's wage claims against set-off has been achieved by statute. Cf. *Isbrandtsen Co.* v. *Johnson*, 343 U. S. 779, 781.

---

[11] For a more recent example of this policy, see *Shilman* v. *United States*, 164 F. 2d 649 (C. A. 2), certiorari denied, 333 U. S. 837.

2. A number of practical considerations, based primarily upon the need for trial convenience, have encouraged limitations on set-offs in admiralty. One of these is the desire to prevent a complicated trial from becoming utterly unmanageable by the injection of extraneous issues. Cf. *Powell* v. *United States,* 300 U. S. 276, 289–290. This consideration, of course, is not applicable where, as here, the claim upon which the libel is based is undisputed and the sole controversy centers on the justification of the withholding. Moreover, complicated trials can be avoided by ordering separate trials in appropriate cases, as is commonly done under Rule 42 (b), Federal Rules of Civil Procedure.

Another factor in admiralty's reluctance to permit set-off has been the possible effect on third party rights. Cf. *Howard* v. *9,889 Bags of Malt,* 255 Fed. 917, 918 (D. Mass.); *The Leonidas,* Olc. 12, 15 Fed. Cas. 348, No. 8262 (S. D. N. Y.); *Castner, Curran & Bullitt* v. *United States,* 5 F. 2d 214 (C. A. 2); *The Ping-On* v. *Blethen,* 11 Fed. 607, 611 (C. C. D. Cal.). Here, the single issue underlying the litigation involves only two parties, both of whom were before the admiralty court.

Finally, admiralty has been loath to permit the trial of a set-off based upon a non-maritime transaction because of the effect upon the adverse party's right to a jury trial. *Bains* v. *The James and Catherine,* Bald. 544, 2 Fed. Cas. 410, No. 756 (C. C. D. Pa.); *Willard* v. *Dorr,* 3 Mason 161, 171–172, 29 Fed. Cas. 1277, 1280, No. 17680; *The Hudson,* Olc. 396, 12 Fed.

Cas. 805, No. 6831 (S. D. N. Y.); *Castner, Curran & Bullitt* v. *United States,* 5 F. 2d 214 (C. A. 2); *Koch-Ellis Marine Contract.* v. *Phillips Petroleum Co.,* 219 F. 2d 520 (C. A. 5); *The Yankee,* 37 F. Supp. 512 (E. D. N. Y.). This consideration plays no role here since the Government's set-off, predicated upon the alleged breach of a maritime contract, is plainly within the admiralty jurisdiction. *Krauss Bros. Co.* v. *Dimon S. S. Corp.,* 290 U. S. 117, 124–125; *Archawski* v. *Hanioti,* 350 U. S. 532, 534–536.

3. The early cases limiting set-off in admiralty also took the view that in this, as in many other aspects of procedure, admiralty followed equity. Cf. *The Dove,* 91 U. S. 381, 385; *Willard* v. *Dorr,* 3 Mason 161, 171–172, 29 Fed. Cas. 1277, 1280, No. 17680 (C. C. D. Mass.); *American Steel Barge Co.* v. *Chesapeake & Ohio Coal Agency Co.,* 116 Fed. 857, 858 (C. A. 1). Equity, however, has permitted independent set-offs and counterclaims since (if not before) the promulgation of the Equity Rules of 1912. Rule 30, 226 U. S. 657.[12] There is no sound reason why admiralty should now lag behind equity. Cf. *British Transport Commission* v. *United States,* 354 U. S. 129, 139. Indeed, the Second Circuit itself has aptly observed that "it is legitimate to treat it [admiralty] as not immune to some of the changes in procedure elsewhere." *Boston Insurance Co.* v. *City of New York,*

[12] The scope of Equity Rule 30 has been clarified and somewhat expanded by Rule 13, Federal Rules of Civil Procedure. See 3 Moore, *Federal Practice* (Second Edition), Section 13.03.

130 F. 2d 156.[13] Reassertion in this case of the view that independent set-offs are categorically barred from the admiralty jurisdiction is an anachronism.[14]

4. There is still another reason why it is peculiarly inappropriate to apply such restrictions here. Prior to the enactment in 1920 of the Suits in Admiralty Act, the Court of Claims and (in cases involving less than $10,000) the district courts had jurisdiction over claims arising under maritime contracts like the one at bar. In such proceedings, the United States had unlimited power of set-off under the equivalents of the present 28 U. S. C. 1346 (c) and 1503. It is hardly to be assumed that, when the Suits in Admiralty Act transferred most maritime claims against the United States to the exclusive jurisdiction of the admiralty courts,[15] Congress sought to curtail the Government's power to withhold and apply.[16]

---

[13] See, also, *Schiavone-Bonomo Corporation* v. *Buffalo Barge Towing Corp.*, 134 F. 2d 1022 (C. A. 2), certiorari denied, 320 U. S. 749; *Esso Standard Oil Co.* v. *United States*, 174 F. 2d 182, 186 (C. A. 2).

[14] The anachronism is further highlighted when it is realized that a non-related counterclaim based on a maritime tort may be pleaded in a civil action brought under the Jones Act. *Fraser* v. *Astra S. S. Corp.*, 18 F. R. D. 240 (S. D. N. Y.).

[15] *Johnson* v. *Emergency Fleet Corp.*, 280 U. S. 320.

[16] The mere fact that the Suits in Admiralty Act does not contain an express equivalent to 28 U. S. C. 1346 (c) and 1503 certainly does not foreclose the right of set-off. The Government's power to withhold and apply does not flow from procedural provisions such as 28 U. S. C. 1346 (c) and 1503, permitting set-off, but from 31 U. S. C. 71, which is of a substantive nature. *United States* v. *Munsey Trust Co.*, 332 U. S. 234, 239–240; *Eastern Transportation Co.* v. *United States*, 159 F. 2d 349, 352 (C. A. 2); *Malman* v. *United States*, 207 F. 2d 897 (C. A. 2). Admiralty can fashion the procedural means

B. Neither the General Admiralty Rules of this Court nor the Admiralty Rules of the District Court require exclusion of the Government's defense

Apart from its holding that the Government's defense of withholding and applying was barred by "settled admiralty practice", the court below was of the view that the same result was "implicitly require[d]" by this Court's Admiralty Rule 50 (*supra*, pp. 3–4) and by Admiralty Rules 16 and 17 of the District Courts for the Southern and Eastern Districts of New York (*supra*, pp. 4–5).

This Court's Rule 50 provides that:

> Whenever a cross-libel is filed upon any counterclaim arising out of the same contract or cause of action for which the original libel was filed, and the respondent or claimant in the original suit shall have given security to respond in damages, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages to the claims set forth in said cross-libel, unless the court for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given unless the court otherwise directs.

It seems clear that Rule 50 deals merely with the giving of security where (1) the claims are reciprocal and (2) one party has already posted security. It

---

for enforcing any substantive law it has been called upon to administer. *The Epsilon*, 6 Ben. 378, 389, 8 Fed. Cas. 744, 748, No. 4506 (E. D. N. Y.); *The Hudson*, 15 Fed. 162 (S. D. N. Y.); *Dowling* v. *Isthmian Steamship Corp.*, 184 F. 2d 758, 778 (C. A. 3). And it may not prescribe a rule abridging or modifying a substantive right created by Congress. 28 U. S. C. 2073.

"has no application unless the respondent or claimant in the original suit, *i. e.*, the cross-libelant, has given security to respond in damages and has given it under compulsion to obtain the release of a vessel or of property under attachment." 2 Benedict, *Admiralty*, (6th ed.), Sec. 331. We find nothing in Rule 50 which purports to limit the district courts' jurisdiction over an unrelated set-off, particularly in a situation where the "set-off" constitutes the sole controversy between the parties. Moreover, Rule 50 has no direct bearing on cases where, as here, the respondent does not seek affirmative relief. *Mayer & Lage* v. *Prince Line*, 264 Fed. 854, 855 (S. D. N. Y.).

Rule 16 of the Southern and Eastern Districts of New York does in terms limit set-offs in admiralty to damages suffered by the respondent growing out of the "transactions referred to in the libel".[17] We do not believe, however, that the Rule is to be construed as conferring upon the libelant the power to limit the respondent's rights by the simple expedient of engaging in an artificially restrictive description of the actual matter in controversy. So construed, the rule would be arbitrary.

More broadly, we suggest that the rule-making power of the district courts does not include authority

[17] The quoted language does not follow this Court's Rule 50 and it is also at variance with local Rule 17. Thus, Rule 17 refers to "the transaction, occurrence or property that is the subject matter of the original cause * * *." The Government's defense meets that formulation, for, in our view, the subject matter of the original cause, disclosed by the pleadings as a whole (albeit disguised in the libel), is the validity of the claim which gave rise to the Government's act of withholding and applying.

to place categorical restrictions on the assertion of set-offs. This Court's Rule 44 (*supra*, p. 3) confers upon the district courts the power "to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided they are not inconsistent with these rules." The import of Rule 44 is that the district courts shall promulgate rules involving local problems. The right of set-off and the scope of that right are matters which substantially affect admiralty practice throughout the nation and should not, we believe, be frozen locally by district court rules.

Moreover, it would be completely out of keeping with the basic character of admiralty practice to require the Government to prosecute a separate lawsuit—involving additional expense, inconvenience and lapse of time—in order to adjudicate the very controversy which moved the respondent to file its libel. Admiralty, which "looks to a complete and just disposition of a many cornered controversy", *Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 216, can certainly dispose expeditiously of this litigation involving, as it does, only one issue and two parties.[18]

---

[18] In admiralty, as at law, "[i]t would be folly to require the government to pay under the one contract what it must eventually recover for a breach of the other." *Pacific-Atlantic Steamship Co.* v. *United States*, 1956 A. M. C. 245, 246 (W. D. Wash.).

III

The District Court improperly awarded compound interest against the United States

Section 3 of the Suits in Admiralty Act, 41 Stat. 526, 46 U. S. C. 743, provides in pertinent part:

> * * * A decree against the United States * * * may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. * * *

The District Court's final decree (R. 21) awarded to respondent:

> * * * the sum of $115,203.76, with interest at four percent (4%) per annum from March 29, 1955 [the day the libel was filed], amounting to the sum of $2,070.51, together with costs in the sum of $40.00, as taxed, amounting in all to the sum of $117,314.27, with interest at four percent (4%) per annum on the said total sum of $117,314.27, from the date of this decree until paid.

The court thus added to the authorized four percent interest which accrued between the time of the filing of the libel and the date of the final decree a further amount of four percent interest on the composite amount of interest and principal.[19] The effect of this

---

[19] The propriety of an award of compound interest may be presented anew even if this Court should agree that the Government is entitled to a trial on its defensive plea. Respondent might prevail at trial. Guidance by this Court would thus serve a purpose.

compounding of interest is to exceed the statutory interest rate of four percent.

Immunity from payment of interest (except in just compensation cases) is an incident of the sovereignty of the United States; it can be waived only by Congress. *United States* v. *N. Y. Rayon Co.*, 329 U. S. 654, 660–661; *United States* v. *Goltra*, 312 U. S. 203, 207; *United States* v. *North Carolina*, 136 U. S. 211.[20] It is equally well settled that statutes which do waive attributes of sovereignty must be construed "strictly in favor of the sovereign." *McMahon* v. *United States*, 342 U. S. 25, 27; see, also, *United States* v. *Michel*, 282 U. S. 656, 659–660; *United States* v. *Whited and Wheless*, 246 U. S. 552, 561.

The compounding of interest—unless there is explicit provision for doing so—is never favored, even as between private persons. *Cherokee Nation* v. *United States*, 270 U. S. 476, 490; *In re Realty Associates Securities Corporation*, 163 F. 2d 387, 392 (C. A. 2), certiorari denied, 332 U. S. 836.[21] *A fortiori*, statutes authorizing the award of interest against the United States are deemed to refer to simple interest only and not to warrant the award of compound interest. *Cherokee Nation* v. *United States*, 270 U. S. 476, 490–491; *Ute Indians* v. *United States*, 45 C. Cls.

---

[20] Congress has not ordinarily allowed pre-judgment interest at all (see 28 U. S. C. 2411, 2516; 31 U. S. C., Supp. V, 724a; 46 U. S. C. 782), no less compound interest.

[21] "The general rule even as between private persons is that in the absence of a contract therefor or some statute, compound interest is not allowed to be computed upon a debt." *Cherokee Nation* v. *United States*, *supra*.

440, 470; *Menominee Tribe of Indians* v. *United States*, 97 C. Cls. 158, 162.[22]

The pertinent statutory provisions authorize the award of "interest at the rate of 4 per centum per annum until satisfied" and at no higher rate unless permitted by contract. They also provide that "[i]nterest shall run as ordered by the court" but not from a time prior to the filing of the libel. The court below apparently believed that the latter clause authorized the District Court to award compound interest. As we read the statute, the court is merely authorized to determine the date from which interest is to run and there is nothing to justify the compounding of interest.

We submit, therefore, that the District Court was without jurisdiction to compound the interest which accrued while the litigation was in progress. Its choice was to allow interest from the time of the filing of the libel or, as is more usual, from the time the final decree was entered.

---

[22] *National Bulk Carriers* v. *United States*, 169 F. 2d 943, 951 (C. A. 3), cited in the opinion below (Appendix, *infra*, p. 44), deals with interest as an element of just compensation for the taking of property, a situation in which specific statutory authority for the award of interest is not deemed required. See *Jacobs* v. *United States*, 290 U. S. 13, 16.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment below should be reversed with directions to remand the case for trial.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
RALPH S. SPRITZER,
Assistant to the Solicitor General.
SAMUEL D. SLADE,
LEAVENWORTH COLBY,
SEYMOUR FARBER,
Attorneys.

DECEMBER 1958.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 5—October Term, 1957.

(Argued November 6, 1957 Decided May 6, 1958.)

Docket No. 24416

GRACE LINE, INC., LIBELANT-APPELLEE,

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLANT.

Before SWAN, MEDINA AND WATERMAN, *Circuit Judges*

The United States appeals from a decree of the United States District Court for the Southern District of New York, in admiralty. William B. Herlands, *Judge*. Opinion below reported at 144 F. Supp. 548. Affirmed.

MEDINA, *Circuit Judge:*

In form the decree in admiralty from which the government appeals was entered *pro confesso* on motion of the libelant Grace Line, Inc., based upon exceptions and exceptive allegations addressed to the sufficiency of the answer, which asserted payment of the claim sued upon.

It is alleged in the libel that between December 31, 1954 and February 16, 1955 Grace carried six shipments of ore for the United States for which freight charges in the amount of $10,732.22 became due and

payable. The validity of this freight claim is not disputed. But the United States paid only $2,490.75, and the remaining $8,241.47, for which the judgment *pro confesso* was entered, was withheld and applied by the Comptroller General against the freight bill because of damages alleged to have been suffered by the United States in a wholly unrelated series of transactions, during the period from December 14, 1952 to April 6, 1953, in connection with which it is claimed that some of the goods transported by Grace were delivered in a damaged condition and some were lost.

The bills of lading under which the 1952–1953 shipments were made provided that "the Carrier shall be discharged from all liability in respect of * * * every claim whatsoever with respect to the goods unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered * * *." The bills also incorporated by reference the Carriage of Goods by Sea Act, 46 U. S. C. § 1301 *et seq.*, which includes a similar one year time bar. No judicial proceedings were instituted by the United States against Grace for the loss of, or damage to, the 1952–1953 shipments within the one year period.

Grace's libel in the court below claimed that freight was due under the 1954–1955 shipments, but made no mention of Grace's earlier transactions with the United States. The government's answer alleged, by way of set-off or defense, that Grace was indebted to the United States in an amount greater than that claimed in the libel because of its mishandling of the earlier shipments. Grace's exceptions to the sufficiency of this answer were sustained on the grounds: (1) that the government's claim based on the 1952–1953 shipments arose from a transaction unrelated to the libel and thus could not be made the subject

of a set-off in an admiralty proceeding; and also (2) that this earlier claim was time-barred.

On this appeal the government urges several grounds for reversal. Its first contention is that the Comptroller General's withholding and applying of funds due a creditor because of the creditor's alleged indebtedness to the United States results in the discharge of "mutual debts" and thus constitutes "payment"; and that an admiralty court must always consider payment as a defense to a libel. The government bases this argument on the provision in 31 U. S. C. § 71 that all claims by or against the United States "shall be settled and adjusted in the General Accounting Office," which it asserts is part of a "comprehensive statutory plan" made up of this and several other statutes, located in different parts of the United States Code,[1] authorizing the withholding of money by the Comptroller General whenever a creditor of the United States is also allegedly indebted to the United States.

The specific issue on this first phase of the case is: what did the Congress mean by 31 U. S. C. § 71, which provides: "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." The question is one of statutory interpretation. We think it merely pricks the surface of the problem to dispose of the case by saying that it is absurd to suppose that the statute was intended to provide the government with a means of keeping stale claims alive indefinitely with respect to those

---

[1] 5 U. S. C., § 46 (d) (Supp. III); 5 U. S. C. § 82; 31 U. S. C. § 227; 49 U. S. C. § 66.

having more or less continuous business relations with the United States.

The semantics of the government approach here is in terms of the defense of "payment." But the underlying thesis must be that the Congress intended to by-pass the process of adjudication and provided in lieu thereof a unilateral decision by the Comptroller General. We can find nothing in the statute to warrant any such inference. It is not provided that the withholding shall constitute payment or a discharge of the debt, nor does the general context, nor any word or phrase therein, indicate that the normal processes of adjudication are to be overridden. Indeed, there is no dispute about the right of the government to proceed, as it often does, to reduce its claim to judgment if it can. Moreover, in the view of the Comptroller General,[2] and under the cases,[3] the withholding by the Comptroller General is subject to judicial review; and no legislative history has been brought to our attention which supports the contention that administrative action by the Comptroller General in withholding money due to a creditor of the United States makes it unnecessary for the government to prove its claim on the merits, subject to such defenses as may exist in law or in fact, if it is to be applied against a claim of the creditor in settle-

---

[2] Letter of the Comptroller General of the United States, 1954 U. S. Code Congressional and Administrative News, 2553, 2554.

[3] E. g., *United States* v. *Munsey Trust Co.*, 332 U. S. 234, 240. In *Munsey*, where the Supreme Court said that "(t)he government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due him,'" 332 U. S. at 239, it was considering the situation where the creditor's debt to the United States was not disputed, and it clearly recognized that such was the fact in the case then before it. 332 U. S. at 237, 240.

ment thereof. In other words, the attempted set-off must be a legally enforceable claim; and the fact that the Comptroller General has decided the claim in favor of the government *ex parte* by withholding the amount thereof from a payment justly due to a creditor of the United States neither constitutes a payment of and discharge of the debt nor does it stop the running of the applicable Statute of Limitations against the government claim in alleged satisfaction of which the Comptroller General takes this unilateral action. Here the period of limitations had plainly run.[4]

The statutory scheme, such as it is, constitutes no more than a method for co-ordinating the claims and debts of the various government departments and agencies.

The government cites Section 322 of the Transportation Act of 1940, 49 U. S. C. § 66, and its application in *United States* v. *Western Pac. R. Co.*, 352 U. S. 59, recently decided by the Supreme Court, as part of the "comprehensive statutory plan" which, it argues, shows that Congress intended that unilateral witholding and applying by the Comptroller General was to constitute payment of a creditor's claim. Consideration of the *Western Pacific* case and 49 U. S. C. § 66 as applied therein, however, lends further support to our view, as expressed above, of the extent and effect of the Comptroller General's power to withhold and apply. In that case three railroads had carried shipments of bomb casings filled with napalm gel, which is inflammable but not self-igniting, for the United States. The railroads billed the United States at the highest, first-class, rates for "incendiary bombs" and the government paid the

---

[4] *United States* v. *Seaboard Air Line Ry. Co.*, 4 Cir., 22 F. 2d 113. Compare 31 U. S. C. § 71, with 49 U. S. C. § 66.

bills of two of the railroads as presented. On post-audit, however, the General Accounting Office made deductions from subsequent bills of these two railroads on the grounds that the shipments of napalm gel should have been carried at the lower, fifth-class, rate. The General Accounting Office had acted pursuant to 49 U. S. C. § 66 which provides: "Payment for transportation of * * * property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act * * * shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier." The railroads sued in the Court of Claims to recover the sums withheld from their subsequent bills and the government's defense rested on three contentions which went to the merits of the carriers' claim for payment of their subsequent bills. There was no contention that those bills had been "paid" by the withholding.

The statute on which the government relied in *Western Pacific* expressly reserved the right to the United States to deduct any overpayment from any subsequent bills, and this additional time was given to the government solely because the General Accounting Office was required to pay the carrier's bills "upon presentation * * *, prior to audit or settlement * * *." Of course, if the Comptroller General already had the power, under the previously enacted 31 U. S. C. § 71 and other statutes authorizing the withholding of money, to "pay" creditor's claims by merely unilaterally applying amounts allegedly due the United States, regardless of the nature of, or time limitation on, the government's claim, there would be

no need for the express reservation in the statute of the right to off-set claims of the United States against carriers' subsequent bills.

Thus it is abundantly clear to us, and we so hold, that the unilateral withholding and applying of money allegedly due the United States on a disputed claim against a creditor does not constitute payment of that creditor's claim against the United States.[5]

Had we agreed with appellant's view that the period of limitations had not run against the government damage claim one might suppose, from the arguments advanced in appellant's brief, that it might be a hardship for the government to pay the Grace claim only to sue for the recovery of the same funds or a part thereof in an action against Grace on the damage claim. But the applicable procedure is clearly set forth in 31 U. S. C. § 227. Where a claim, such as the Grace claim for freight charges, is undisputed, the government may let the case proceed to judgment, after which Section 227 in terms provides that "it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt" due to the United States. In the event that the claimant does not acquiesce in the withholding but denies his indebtedness to the United States, Section 227 continues, "then the Comptroller General of the United States shall withhold payment of such further amount of such judgment as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment," and "if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately com-

---

[5] See also, *Climactic Rainwear, Inc.* v. *United States*, 115 Ct. Cl. 520.

menced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch."

Appellant also attacks the ruling of Judge Herlands to the effect that appellant's damage claim was unrelated to the claim for the unpaid balance of freight charges alleged in the libel and hence was not within the admiralty jurisdiction, which only extends to set-offs arising out of the same transaction as that on which the libel is based. But this is the well settled admiralty practice, as Supreme Court Admiralty Rule 50 and the Southern and Eastern District Court Admiralty Rules 16 and 17 implicitly require that the set-off arise out of the same transaction. We have repeatedly so held, and as recently as 1951. *Ozanic* v. *United States,* 188 F. 2d 228; *Castner, Curran & Bullitt, Inc.* v. *United States,* 5 F. 2d 214; *United Transp. & Lighterage Co.* v. *New York & Baltimore Transp. Line,* 185 Fed. 386.

The first point made by appellant on this phase of the case need not long detain us. The substance of this point is that the real controversy between the parties was the damage claim which we have already determined was time barred, and that Grace has limited the government's assertion of this claim "by artificial methods of framing (its) * * * libel." In other words, although Grace has not received the balance due for its freight charges, and asserts in its libel only its claim for the payment of this balance, appellant argues that there is really no dispute about the validity of the claim for freight charges, that this is a purely fictitious issue and that the claim is made in admiralty to foreclose the assertion by appellant of its unrelated damage claim. But there is nothing in this, nor do the cases relied on by appellant so hold. In each of these cases the state of the pleadings was

such that the issues litigated and decided were properly before the court. *Kreitmeyer* v. *Baldwin Drainage District,* 2 F. Supp. 208, 210 (S. D. Fla.), aff'd *sub nom. Florida Nat'l Bank of Jacksonville* v. *Hemphill,* 5 Cir., 68 F. 2d 785; *Eastern Transportation Co.* v. *Blue Ridge Coal Co.,* 2 Cir. 159 F. 2d 642; *Alcoa Steamship* v. *United States,* 80 F. Supp. 158, rev'd, 2 Cir., 175 F. 2d 661, aff'd, 338 U. S. 421.

In the case at bar the subject-matter of the libel was the alleged debt of the United States to Grace arising out of the 1954–1955 shipments, and there is no relationship whatever between this claim asserted in the libel and the claim asserted by the government. No amount of pleading can alter the fact that in this case there is no affirmative defense raised by the government, but rather an attempt to interpose a set-off which is barred by established admiralty procedure.

Appellant's other points are equally unpersuasive. It is idle to cite the numerous general statements in the authorities to the effect that admiralty practice is "nontechnical, flexible and plastic," and to emphasize the liberality of the Federal Rules of Civil Procedure and the modern tendency to discard procedural impediments to the administration of justice in the courts. There must be rules to govern such matters as joinder of parties and claims, set-offs, counterclaims and third party practice; and here we have a rule which has stood the test of time and has been applied again and again. We are not at liberty to disregard or overrule it.

Appellant also contends, in this connection, that, even if the admiralty rules prevent the pleading of unrelated set-offs, such a procedural limitation is overcome by the statutory plan which gives the General Accounting Office the "substantive right" to with-

hold and apply money due a creditor. This argument that the admiralty procedural rule deprives the government of a substantive right is untenable. The substantive right of the government in the case at bar is its claim for damages resulting from Grace's alleged mishandling of the 1952–1953 shipments. The admiralty rule respecting set-offs is merely part of a congeries of procedural provisions, including the statutes establishing the government's right to withhold and apply, which do not affect the substantive rights of the parties in the case at bar.

Appellant also argues that, even if the strict admiralty rule respecting set-offs is to be applied in this case, the 1952–1953 and 1954–1955 shipments were "merely fragments of a single vast overall transaction" between Grace and the United States. However, the only connection between the shipments during the two separate periods is that both were undertaken by the same shipper, Grace, and, in our view, this alone cannot bring the dealings within the concept of a single transaction. Thus we hold that the court below correctly sustained Grace's exception to the government's pleading of its unrelated set-off.

The final point with which we must deal is the trial court's award of interest at 4% per annum from the date of the decree until the decree is paid, on the composite amount of the sum sought in the libel plus interest at 4% per annum on this amount from the date of filing the libel until the date of the decree. Appellant argues that the court below lacked the power to award this "compound interest." However, Section 3 of the Suits in Admiralty Act, 46 U. S. C. § 743 provides that "* * * when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied * * *" may be included in the decree against the United States, and that

"(i)nterest shall run as ordered by the court * * *" There is no showing that the discretion vested in the trial court was abused by the decree in the case at bar. See *National Bulk Carriers* v. *United States,* 3 Cir., 169 F. 2d 943, 951.

Affirmed.

WATERMAN, *Circuit Judge* (concurring):

I concur with the majority in affirming the judgment of the District Court. I disagree with my colleagues, however, in their characterization of the Government's position with respect to the defense of "payment." I do not understand the Government to argue that the "withholding and applying" procedure which it contends is authorized by 31 U. S. C. § 71 "makes it unnecessary for the Government to prove its claim on the merits * * *" I understand the Government's position to be that the merits of its claim may be adjudicated by a court of competent jurisdiction in an action brought by Grace Line to recover for the alleged wrongful withholding and that the Government does not intend to "by-pass the process of adjudication." Consistent with the position I understand the Government to have taken here, I note that in the case of *Isbrandtsen Company, Inc.* v. *United States,* the United States does not deny that the validity of its claim against Isbrandtsen is raised by Isbrandtsen's libel to recover amounts the Government had withheld and applied upon the claim.